88-1302

No. _____

Supreme Court, U.S.
FILED
FEB 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

PATRICIA BOHATCH, *et al.*,
Petitioners,

vs.

CHARLOTTE V. DELHAES, M.D., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals, Eleventh Appellate District, Lake County, Ohio

EUGENE A. LUCCI, *Counsel of Record*
WALTER J. MCNAMARA III
MCNAMARA, LUCCI & LOXTERMAN
7200 Center Street, Suite 300
Mentor, Ohio 44060
(216) 974-1119 953-9455
Counsel for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

I.

QUESTIONS PRESENTED

i. Does Ohio's judicially determined law that a physician need not inform a patient of material risks with respect to proposed medical or drug therapy if a "reasonable person" would consent to such therapy violate the Ninth and Fourteenth Amendments' fundamental right of privacy of a patient to make personal decisions as to his or her health care and to be informed of significant options concerning the course of his or her health care and the material risks attendant thereto?

ii. Does Ohio's judicially determined law that a physician need not inform a patient of material risks involved with respect to proposed medical or drug therapy if a "reasonable person" would consent to such therapy violate the Fourteenth Amendment guarantee of due process by giving a physician control over the body and future of a patient which control should properly rest within the sovereignty of the patient herself?

iii. Does Ohio's judicially determined law that a physician need not inform a patient of material risks involved with respect to proposed medical or drug therapy if a "reasonable person" would consent to such therapy deny procedural due process guaranteed under the Fourteenth Amendment by placing a patient under an impossible burden of proof so that a patient is not entitled to redress in the Ohio courts for a physician's failure to inform the patient of material risks of therapy unless the very suggestion itself of the therapy is an act of negligence by the physician?

II.

iv. Does Ohio's judicially determined law that a physician need not inform a patient of material risks involved with respect to proposed medical or drug therapy if a "reasonable person" would consent to such therapy violate the equal protection clause of the Fourteenth Amendment by creating a class of persons (namely patient-Plaintiffs) who are less protected and have less access to redress in the courts provided by Ohio law than in other fiduciary relationships with professionals and by creating a favored class of physicians over other professionals?

III.

LIST OF PARTIES

The petitioners are Patricia Bohatch and her husband, William Bohatch, who were Plaintiffs in the medical malpractice civil proceeding instituted against respondents, The Cleveland Clinic Foundation and its employee, A. Dixon Weatherhead, M.D., and the Lake County Medical Health Center and its employee, Charlotte V. Delhaes, M.D.

TABLE OF CONTENTS

Questions Presented I
List of Parties III
Table of Authorities VI
Opinions Below 2
Jurisdiction 2
Constitutional Provisions Involved 3
Statement of the Case 4
Reasons for Granting the Writ 9
Conclusion 30

Appendix:

Order of the Supreme Court of Ohio Overruling Appeal (November 9, 1988)..... A1

Judgment Entry and Opinion of the Court of Appeals of Lake County, Ohio (June 20, 1988).. A2

Judgment Entry of the Lake County Court of Common Pleas (June 9, 1986)..... A11

Fifth Amendment to the United States Constitution..... A12

Ninth Amendment to the United States Constitution..... A12

Fourteenth Amendment to the United States Constitution..... A12

Ohio Constitution, Article I, Section 1..... A13

Ohio Constitution, Article I, Section 2 ..... A13

Ohio Constitution, Article I, Section 7 ..... A13

Ohio Constitution, Article I, Section 16 ..... A14

Syllabus, *Nickell v. Gonzalez*, 17 Ohio St.3d 136 (1985)..... A15

Syllabus, *Presley v. Norwood*, 36 Ohio St.2d 29 (1973)..... A16

Excerpt of Transcript of Proceedings (page 634) . A17

Brief in Support of Plaintiffs' Proposed Jury Instructions (June 6, 1986)..... A18

TABLE OF AUTHORITIES

Cases

Arena v. Gingrich, 748 P.2d 547 (Or. 1988)..... 16

Bartling v. Superior Court, 209 Cal. Rptr. 220, 163 Cal. App. 3d 186 (1984)..... 16

Board of Regents v. Roth, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972) 13

Boddie v. Connecticut, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971)..... 21

Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841, *reh. den.* (US) 92 L. Ed. 2d 779, 107 S. Ct. 29 (1986) 14

California Transport v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972) .. 21

Carey v. Population Services Int'l., 431 U.S. 678, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977) 14

Cheung v. Cunningham, 214 N.J.Super. 649, 520 A.2d 832 (1987) 17,22,23,28

Congrove v. Holmes, 37 Ohio Misc. 95, 308 N.E.2d 765 (1973)..... 27

Connelly v. Balkwill, 174 F.Supp. 49 (N.D. OH 1959).. 29

Dorchy v. Kansas, 264 U.S. 286 (1924) 23

Duren v. Suburban Community Hosp., 24 Ohio Misc. 2d 25 (1985)..... 25

Eisenstadt v. Baird, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972) 24,25

Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967) 29

Graley v. Satayatham, 74 Ohio Op. 2d 316 (1976) ... 26

Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965) 13,14

In re Brown, 478 So. 2d 1033 (Miss. 1985) 17

Jiron v. Mahlab, 659 P.2d 311 (NM 1983) 21

Karl J. Pizzalotto, M.D., Ltd. v. Wilson, 437 So. 2d 859 (La. 1983) 27

Leyson v. Steuermann, 705 P.2d 37 (Hawaii 1985) ... 11

Matter of Conroy, 486 A.2d 1209 (NJ 1985) 17

Matter of Dolan, 76 N.J. 1, 384 A.2d 1076 (1978) ... 29

Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976) .. 12

McPherson v. Ellis, 287 S.E.2d 892 (NC 1982) 18

Mills v. Rogers, 457 U.S. 291, 73 L. Ed. 2d 16, 102 S. Ct. 2442 (1982) 20

Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960) 11

Nickell v. Gonzalez, 17 Ohio St. 3d 136 (1985) 6,7,9 17,22,30

Olmstead v. United States, 277 U.S. 438, 72 L. Ed. 944, 48 S. Ct. 564 12

People v. Belous, 80 Cal. Rptr. 354, 458 P.2d 194 (1969) 16

Poulin v. Zartman, 542 P.2d 251 (Alaska 1975) 11

Presley v. Norwood, 36 Ohio St. 2d 29, 65 Ohio Op. 2d 129 (1973) 8

Rivers v. Katz, 495 N.E.2d 337 (NY 1986) 18,19

Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705, *reh. den.* 410 U.S. 959, 35 L. Ed. 2d 694, 93 S. Ct. 1409 (1973) 11,12,24

Rogers v. Okin, 634 F.2d 650 (First Cir. 1980) 19,20

Royster Guano Co. v. Virginia, 253 U.S. 412, 64 L. Ed. 989, 40 S. Ct. 560 (1920) 25

Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914) 22,27

Scott v. Bradford, 606 P.2d 554 (Okla. 1979) 11

Sexton v. Barry, 1 Ohio Op. 2d 231 (U.S. Ct. App., Sixth Cir., 1956) 29

Shetter v. Rochelle, 2 Ariz. App. 358, 409 P.2d 74 (1965) 27

Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164 (1976) 23,24

Smith v. Patterson, Supreme Court Commission of Ohio, December Term 1877, page 70 29

Thornburgh v. American Coll. of Obst. Gyn., 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986) 15

Union Pacific R. Co. v. Botsford, 141 U.S. 250, 35 L. Ed. 734, 11 S. Ct. 1000 (1891) 11

Wilkinson v. Vesey, 295 A.2d 676 (RI 1972) 22

Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962) 19

IX.

Constitutions

U.S. Constitution, Amendment V 3,10,12,30

U.S. Constitution, Amendment IX . . . 3,10,11,12,13,14,30

U.S. Constitution, Amendment XIV . . . . . *passim*

Ohio Constitution, Article I, Section 1 3,10,11,21,30

Ohio Constitution, Article I, Section 2 . 3,10,11,24,26,29,30

Ohio Constitution, Article I, Section 7. 3,10,11,30

Ohio Constitution, Article I, Section 16 3,23,30

No. _____

IN THE

Supreme Court of the United States

October Term, 1988

PATRICIA BOHATCH, *et al.*,
Petitioners,

vs.

CHARLOTTE V. DELHAES, M.D., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals, Eleventh Appellate District, Lake County, Ohio

Petitioners William Bohatch and Patricia Bohatch petition for a Writ of Certiorari to review the Decision and Journal Entry of the Court of Appeals for the Eleventh District, Lake County, Ohio, further review of said decision having been declined by the Ohio Supreme Court.

OPINIONS BELOW

The Lake County Court of Common Pleas did not issue a written opinion as such. The Judgment Entry embodying the verdict in favor of Respondents is reproduced in the Appendix hereto at page A11. The opinion of the Lake County Court of Appeals is unreported, and reproduced in the Appendix hereto at page A3. The Entry of the Ohio Supreme Court denying Leave to Appeal is also unreported. It is reproduced in the Appendix hereto at page A1.

JURISDICTION

The opinion and Journal Entry of the Eleventh District Court of Appeals for Lake County, Ohio, was entered on June 20, 1988. Leave to Appeal to the Ohio Supreme Court was denied on November 9, 1988. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution, the pertinent text of which is set forth in the Appendix at page A12.

2. The Ninth Amendment to the United States Constitution, the pertinent text of which is set forth in the Appendix at page A12.

3. The Fourteenth Amendment to the United States Constitution, the pertinent text of which is set forth in the Appendix at page A12.

4. Section 1 of Article I (Bill of Rights) of the Constitution of Ohio, the pertinent text of which is set forth in the Appendix at page A13.

5. Section 2 of Article I (Bill of Rights) of the Constitution of Ohio, the pertinent text of which is set forth in the Appendix at page A13.

6. Section 7 of Article I (Bill of Rights) of the Constitution of Ohio, the pertinent text of which is set forth in the Appendix at page A13.

7. Section 16 of Article I (Bill of Rights) of the Constitution of Ohio, the pertinent text of which is set forth in the Appendix at page A14.

STATEMENT OF THE CASE

During the spring of 1983, Petitioner Patricia Bohatch developed psychotic depression. On May 27, 1983, she was admitted as an in-patient into the care of Respondents, The Cleveland Clinic Foundation and its employee-psychiatrist, Dr. Weatherhead.

During Patricia Bohatch's stay at the clinic, Dr. Weatherhead administered to her a course of treatment involving Haldol, an anti-psychotic drug.

No informed consent was obtained for the Haldol treatment from either Patricia Bohatch, William Bohatch or any other family member. There was no discussion whatsoever with Petitioners regarding the proposed use of the Haldol prior to its being administered, or at any time prior to Patricia's discharge from the Cleveland Clinic.

Patricia Bohatch was discharged from the care of the Cleveland Clinic and Dr. Weatherhead on June 28, 1983 into that of a more local facility on an out-patient basis, under the care of Respondents, The Lake County Mental Health Center and its employee-psychiatrist, Dr. Delhaes. At discharge from the Cleveland Clinic, a prescription for one hundred tablets of Haldol was given to Patricia Bohatch to be taken three times a day for one month.

Dr. Delhaes continued to prescribe Haldol for Patricia Bohatch, the last prescription being written on December 22, 1983, and calling for refills through March, 1984.

An informed consent of Petitioners also was *not* obtained prior to, or at any time during, the administration of the Haldol by the Lake County Mental Health Center and Dr. Delhaes. In fact, there was no discussion with the Bohatchs or any of their family

members regarding alternatives to the Haldol use or the risks and benefits of its continued use.

In November, 1983, Patricia Bohatch seemed to manifest slight abnormal movement of her upper torso. In January, 1984, Patricia Bohatch began to have obvious signs of an abnormal muscular movement in her head, upper torso and left arm. It was learned that Patricia Bohatch had contracted an abnormal movement disorder commonly termed tardive (delayed onset) dyskinesia. After it was learned that the Haldol administration was responsible for the movement disorder, and that movement disorders are a fairly common side effect of the use of drugs such as Haldol (which are called "neuroleptics") suit was filed against the Respondents. Petitioners proved at the trial (indeed, it was admitted by Respondents) that Patricia Bohatch is suffering from the movement disorder, which is serious, severe, painful, incurable, untreatable, and permanent in nature. Patricia Bohatch, being a female, over forty years of age, and suffering her particular mental condition, was at greater risk in actually contracting this movement disorder from the drug. Five (5%) to twenty (20%) percent of patients in this risk category who use Haldol contract severe and persistent movement disorders, and movement disorders are a well-known, widely recognized, and notorious adverse consequence of Haldol use. A movement disorder from Haldol use can occur with as little as *three* administrations.

Alternatives exist to the use of Haldol, among which include electroconvulsive therapy (ECT). ECT has few, if any, adverse side effects, and no serious or significant long-term consequences. Moreover, ECT is very effective and is an actual "substitute" for the combined use of Haldol and another drug (an anti-depressant) which Patricia Bohatch was taking. Other alternatives exist, in

that there are "less potent" anti-psychotic drugs than Haldol, namely, Mellaril, which has the "*least* propensity" to cause serious movement disorder, and there was always the option of no *neuroleptic* treatment whatsoever, the patient being treated with antidepressants and psychotherapy.

Evidence was presented at the trial that, if Petitioners had been fully informed as to the nature of the Haldol therapy proposed, the probable consequences of the Haldol treatment, the existence and extent of risks and hazards of the Haldol, the risks of not consenting to the Haldol treatment, the benefits anticipated from the Haldol, the availability of alternative treatments and attendant risks thereto, and the possible or probable consequences of accepting no treatment whatsoever, consent to the use and administration of the Haldol would *not* have been granted, and instead, Mellaril used.

Petitioners submitted their trial brief, an informed consent instruction, and a specific brief setting forth the proposition that an objective/reasonable person consent standard violates the patient's right of self-determination (Brief in Support of Plaintiffs' Proposed Jury Instructions, reproduced in the Appendix hereto at page A18) apprising the trial court of, and requesting a *subjective* (patient-oriented) instruction on the issue of consent. See excerpt of the trial proceedings, reproduced in the Appendix hereto at page A17. The Court overruled Petitioners' requested jury instruction, and instead used the syllabus in *Nickell v. Gonzalez*, 17 Ohio St. 3d 136 (1985), as the instruction, which is a *reasonable person* (objective) standard for consent. The *Nickell* syllabus is reproduced in the Appendix hereto at page A15.

The Court instructed the jury, on eight occasions throughout the jury instructions, that in order to prevail, Petitioners must prove that "a *reasonable* person in the position of the plaintiff *would* have decided *against* the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to her prior to the therapy."

The Ohio Eleventh District Court of Appeals, in its opinion, at page 5 (Appendix page A7) stated:

> In the instant cause, there is *no dispute in the evidence that defendants failed to disclose* to Mrs. Bohatch and discuss with her the "material risks and dangers inherently and potentially involved with respect to" haldol, a proposed therapy for her condition. *Nor is there any dispute* that the "unrevealed risks and dangers ... *actually materialized* and are the proximate cause of the injury to" Mrs. Bohatch. However, the evidence was such that reasonable minds could have reached different conclusions as to whether "(a) reasonable person in the position of" Mrs. Bohatch would have decided against the use of haldol as therapy for her mental condition (emphasis added).

Therefore, according to the Court of Appeals, the verdict turned *solely* on the issue of the standard of consent in this informed consent case.

The Court of Appeals overruled Petitioners' assignment of error (No. 1) on this issue in reliance upon the clearly stated reasonable person standard held in *Nickell v. Gonzalez, supra*, and stated further, that a review of the record also "indicates that the Bohatchs did not object to the subject instruction. Therefore, the Bohatchs may not assign as error the court's giving of the subject instruction." (Appendix p. A6).

The issue of the alleged failure to formally object to the subject instruction does not preclude the assignment of error of this instruction, because the record

affirmatively shows that the trial court was fully apprised by Petitioners of the patient-subjective consent standard and unsuccessfully requested the inclusion of that law in the trial court's charge to the jury. The syllabus of *Presley v. Norwood,* 36 Ohio St. 2d 29, 65 Ohio Op. 2d 129 (1973) is reproduced in the Appendix hereto at page A16.

It is anticipated that Respondents may suggest that they had no duty to obtain the informed consent of Petitioner William Bohatch prior to the administration of the Haldol therapy to his wife. However, the trial court instructed the jury on Ohio law as follows:

> In your consideration of the issues of whether a reasonable person, in the position of Mrs. Bohatch, *or a person acting for her,* would have decided against the therapy had the risks of her therapy been disclosed to her . . .
>
> . . . A physician who treats a patient without or beyond his consent *or the consent of another person qualified to give consent on behalf of the patient,* is liable in damages for injury caused by the undisclosed risk . . .
>
> . . . Even in a situation where a physician asserts a privilege to withhold information for reasons of this sort, the physician must make a reasonable attempt to secure the consent if possible, *of a close relative or a person directly responsible for the patient* . . . (emphasis added).

Therefore, the failure to secure the informed consent of William Bohatch precluded the jury from finding, as a basis for its general defense verdict, that Respondents were privileged from disclosing the material risks to and obtaining the informed consent of Patricia Bohatch. Furthermore, Respondents neither cross-appealed, nor assigned as error, the court's instruction of a physician's duty to obtain the informed consent of Mr. Bohatch in the event that Mrs. Bohatch was unable to receive the required information.

REASONS FOR GRANTING THE WRIT

A.

THE STATE OF OHIO VIOLATES A PATIENT'S FUNDAMENTAL RIGHT OF PRIVACY WHEN IT JUDICIALLY CREATES A LAW THAT A PHYSICIAN IS NOT REQUIRED TO INFORM A PATIENT OF THE MATERIAL RISKS AND DANGERS INVOLVED WITH RESPECT TO PROPOSED THERAPY IF A REASONABLE PERSON IN THE POSITION OF THE PATIENT WOULD HAVE CONSENTED TO THE THERAPY.

The essence of Petitioners' constitutional claim here is that the law of Ohio denied her the personal sovereignty of her body without any conflicting, much less compelling, state interest, in violation of her rights to privacy, due process and equal protection of the law.

In its opinion, the Court of Appeals of the Eleventh Appellate District of Ohio confirmed (Appendix page A7), that:

> . . . there is no dispute in the evidence that defendants failed to disclose to Mrs. Bohatch and discuss with her the 'material risks and dangers inherently and potentially involved with respect to' haldol . . . Nor is there any dispute that the 'unrevealed risks and dangers *** actually materialized and are the proximate cause of the injury to' Mrs. Bohatch. However, the evidence was such that reasonable minds could have reached different conclusions as to whether '[a] *reasonable person* in the position of' Mrs. Bohatch would have decided against the use of haldol as therapy for her mental condition (emphasis added).

The state appellate court in that paragraph followed the syllabus of the Ohio Supreme Court in *Nickell v. Gonzalez* (1985), 17 Ohio St. 3d 136, which held that the

three elements of the tort of failure to secure informed consent were, in essence, (a) failure to disclose material risks involved in the therapy, (b) that the undisclosed risks materialized and were the proximate cause of injury and "(c) [a] reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy".

In short, the law of Ohio is that a person's right to redress in the courts for the tort of failure of a physician to obtain the informed consent of a patient is one which is not subject to the patient's individual decision, but to the decision of the doctor that a reasonable person in the position of the patient would undertake the proposed therapy.

By denying redress in the courts in this fashion. Ohio law intrudes invasively and impermissibly upon the personal freedom and sovereignty of the individual patient.

Idiosyncratic behavior is a hallmark of the American character. The right to extend your arm as far as you want, as long it interferes with no one else, is one of the basic and fundamental rights valued by American society and embodied in the United States Constitution through the Fifth, Ninth and Fourteenth Amendments, and in the Ohio Constitution, Article I, Sections, 1, 2 and 7.

The choices a person makes with respect to her body are matters of fundamental right. In some instances, a conflicting state interest or public interest may need to be resolved, and, depending upon the type of fundamental right involved, balanced against the right of the individual. However, the instant case is one in which Ohio law clearly does not "balance" or serve any

compelling public need. The Ohio law, as applied, simply makes the patient subordinate to the physician's judgment and transforms the physician from trusted medical advisor and therapist to benign dictator of an individual's fate.

It should not matter whether an individual wishes to refuse medical treatment for the wrong reasons. It is the right of the individual to refuse medical treatment, or certainly to choose among any rational options available. See *Scott v. Bradford*, 606 P.2d 554 (Okla. 1979); *Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093 (1960); *Leyson v. Steuermann*, 705 P.2d 37 (Hawaii 1985); *Poulin v. Zartman*, 542 P.2d 251 (Alaska 1975).

The deprivation of this right is a deprivation of the personal sovereignty and the concomitant right of privacy enjoyed by the individual under the Ninth and Fourteenth Amendments to the United States Constitution and under the Ohio Constitution, Article I, Sections 1, 2 and 7.

The right of privacy embodied in the United States Constitution is fundamental and has been recognized "perhaps as far as the *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 35 L. Ed. 734, 11 S. Ct. 1000 (1891)." (See *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973) (at L. Ed. 2d 176).

In *Roe v. Wade*, the Court stated (at L. Ed. 2d 177): "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." When dealing with such "fundamental rights" the court in *Roe* determined that only a "compelling state interest" would justify its

restriction (at 178). See also *Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976).

Mr. Justice Douglas stated, in his concurring opinion, that the personal liberties expressed through the Fourteenth Amendment could be classed into three areas: those involving the freedom of speech, which were absolute and permit no exceptions; those involving basic decisions respecting family life, subject to the exception of the "compelling state interest" (*Roe*, at 187); and "(t)hird is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf", which Mr. Justice Douglas also found to be subject only to "compelling state interest" (*Roe*, at 188).

In his analysis, Mr. Justice Douglas refers (at 188) to a concept of Mr. Justice Brandeis, that the right is akin to the right "to be let alone" (citing *Olmstead v. United States*, 277 U.S. 438, 478, 72 L. Ed. 944, 48 S. Ct. 564 (dissenting opinion).

The liberties espoused in *Roe* are important, significant and fundamental to the character of the American people. Their expression in the Constitution through the Fifth, Ninth and Fourteenth Amendments is significant because it embodies probably what is mostly taken for granted.

The restriction by Ohio of redress to its courts for denial of one's personal sovereignty clearly violates the right, even though the violation is in the form of a denial of access to a civil remedy, rather than direct governmental interference.

Even though the government of Ohio does not provide criminal penalty, nor intrudes with regulation beyond denial of access to its courts for civil remedy, that denial, in and of itself, restricts the fundamental liberty of personal sovereignty.

As the court noted in *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701: "In a constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." (at L. Ed. 2d 558). In his opinion in *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965). Mr. Justice Douglas elucidated the concept that there are zones of privacy protected from governmental intrusion and that, as a line of cited cases and the opinions "suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.... Various guarantees create zones of privacy." (at L. Ed. 2d 514).

Describing the concept of marriage as part of the right of privacy, the opinion in *Griswold* stated: "We deal with the right of privacy older than the Bill of Rights—older than our political parties, older than our school system" (at L. Ed. 2d 516).

The concurring opinion of Mr. Justice Goldberg in *Griswold* further analyzed the Ninth Amendment as it applies to such rights:

> "This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights. The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.
>
> The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Amendment is almost entirely the

> work of James Madison . . . It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected (at L.Ed.2d 517).

In short, substantial authority exists for the concept that the Ninth Amendment, as well as the Fourteenth Amendment, protects fundamental rights of privacy and that the compelling state interest test will be applied to those rights which affect a person's control and decision concerning his or her own body. See also *Carey v. Population Services Int'l.*, 431 U.S. 678, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977).

In some instances, the Court has found that there are countervailing interests which would override an individual's right to privacy and to the complete control of his body.

For example, in *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986), the Court decided that the various and sundry cases, which guaranteed a right of privacy in matters of family, procreation, marriage and child rearing decisions, did not extend to rights where a compelling state interest overrode the interest of individual. In that case, the Court held that the rights of homosexuals to engage in consensual acts of sodomy in their home was not a right protected by the Fourteenth Amendment. The Court distinguished certain illegal conduct and made clear that it could not be protected by constitutional extension: "Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home." (at L. Ed. 2d 149).

However, there is no countervailing or competing interest to justify Ohio law permitting physicians to escape liability, or in determining that, if a reasonable person in the position of the patient would not refuse the medical treatment, then the patient need not be informed about the material risks of the proposed treatment.

The question of issue here is whether an adult, after being informed of her various medical options and the material risks attendant thereto, may refuse to undergo the treatment, for whatever reason—be it a valid reason in the mind of the physician or anyone else. Such an adult should not be forced to undergo the treatment or therapy prescribed, and should not be "tricked" into undergoing treatment by the doctor's omission of material facts.

The Supreme Court recognized that the state could impermissibly and unconstitutionally interfere with a woman's choice in the area of informed consent in *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986). In that case, the Court ruled that a Pennsylvania statute requiring certain information to be given to a woman seeking an abortion, in essence, unconstitutionally interfered with the woman's right to an informed consent by stepping over the line into intimidation.

The Court's opinion indicated that: "Close analysis of those provisions, however, shows that the wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a decision that, with her physician, is hers to make." (at L. Ed. 2d 793). The right of privacy embodies the right to be free from intimidation because "(a)ny other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all" (at L. Ed. 2d 801).

The constitutional relationship of privacy to medical care has been recognized consistently by state courts.

The California Supreme Court, deciding *People v. Belous,* 80 Cal. Rptr. 354, 458 P.2d 194 (1969), found the right of privacy encompassed the right of the decision of a woman to determine whether to bear children and could only be circumscribed by narrowly drawn legislation in support of a compelling state interest.

The *Belous* court found that the delegation to a doctor of the decision as to whether a woman qualified for an abortion, in essence, subverted the woman's rights and directly violated the Fourteenth Amendment to the United States Constitution.

California also decided, in *Bartling v. Superior Court,* 209 Cal. Rptr. 220, 163 Cal. App. 3d 186 (1984), that competent adult patients have the right to have life support disconnected even though that would hasten or mean their death.

The California Court of Appeals in that case stated that the absence of the consent of a competent adult person to medical treatment amounts to a battery (at Cal. Rptr. 224). If "the right of the patient to self-determination as to his own medical treatment is to have any meaning at all, it must be paramount to the interest of the patient's hospital or doctors. The right of a competent adult patient to refuse medical treatment is a constitutionally guaranteed right which may not be abridged." The court went on to find that "the right of a competent adult patient to refuse medical treatment has its origins in a constitutional right of privacy" (at Cal.Rptr. 225).

Noting that informed consent goes beyond mere negligence, the Supreme Court of Oregon in *Arena v. Gingrich,* 748 P.2d 547, 549 (Or. 1988) stated that: "If

omitted information would have led a particular patient to reject treatment for some *idiosyncratic and unpredictable* reason, this fact may bear on the reasonableness of the omission, but it has no bearing on cause and effect" (emphasis added).

In *Cheung v. Cunningham*, 214 N.J.Super. 649, 520 A.2d 832, 834 (1987), the New Jersey court recognized that the objective standard set forth by Ohio in *Nickell, supra*, "denies the individual's right to decide what is to be done with his or her body and may deny the individual the right to base consent on proper information in light of their individual fears, apprehensions, religious beliefs and the like."

The right of privacy as applied to determining one's own medical treatment is such that it overrides even the right of the state to force a transfusion on a witness in order to have the witness living and available for trial, in the opinion of the Mississippi Supreme Court *In Re: Brown*, 478 So. 2d 1033, 1036 (Miss. 1985), where the court said that the right to refuse treatment was a protection against the "tyranny of the majority" and the power of the state. Such rights "are what gives meaning to that article of American faith: that each human being is unique, that by virtue of his humanity he possesses an unalienable and undeniable dignity and worth that he is entitled to the maximum basic personal liberty consistent with like liberty for each other." (at 1037). Noting that the right of privacy is accorded constitutional stature, the court also said that the doctrine of informed consent is a manifestation of that right. (at 1040).

The constitutional basis of the right of privacy to make an informed consent as to one's medical treatment was also found by the New Jersey Supreme Court in *Matter of Conroy*, 486 A.2d 1209, 1222 (N.J. 1985). The court noted that, in general, it is the doctor's role to

provide the necessary medical facts and the patient's role to make the subjective treatment decision based on his understanding of those facts. "The patient's ability to control his bodily integrity through informed consent is significant only when one recognizes that this right also encompasses a right to informed refusal . . . The right to make certain decisions concerning one's body is also protected by the federal constitutional right of privacy."

The importance of patient sovereignty versus the so-called "objective standard" of whether a reasonable person would consent to treatment is emphasized by the language of the Supreme Court of North Carolina in *McPherson v. Ellis*, 287 S.E.2d 892, 897 (NC 1982), where the court indicated that the "objective standard" fails because:

> . . . (i)n determining liability by whether a reasonable person would have submitted to treatment had he known of the risk that (the physician) failed to relate, no consideration is given to the peculiar quirks and idiosyncracies of the individual. His supposedly inviolable right to decide for himself what is to be done with his body is made subject to a standard set by others. The right to base one's consent on proper information is effectively vitiated for those with fears, apprehensions, religious beliefs, or superstitions outside the mainstream of society.

According to the Ohio Supreme Court, only those whose thinking is squarely within the mainstream of society would have their constitutional right of privacy protected by the law of Ohio.

The New York Court of Appeals in *Rivers v. Katz*, 495 N.E.2d 337 (NY, 1986) found the right of a competent adult to refuse medical treatment is a constitutionally protected right.

The court, relying in part on the New York Constitution, recognized that:

> . . . a patient's right to determine the course of his medical treatment was paramount to what might otherwise be the doctor's obligation to provide medical care, and that the right of a competent adult to refuse medical treatment must be honored, even though the recommended treatment may be beneficial or even necessary to preserve the patient's life. . . This fundamental common-law right is coextensive with the patient's liberty interest protected by the due process clause of our State Constitution . . .
>
> . . . In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires . . . (at 341).

The right to refuse even important and life-saving medical treatment was also recognized by the Supreme Court of New Mexico in *Woods v. Brumlop*, 377 P.2d 520 (NM 1962).

Finally, this long line of cases recognizing the constitutional right of patients to refuse treatment under the penumbra of the fundamental right of privacy was confirmed by the U.S. Court of Appeals in *Rogers v. Okin*, 634 F.2d 650 (First Cir. 1980).

That case dealt with the right of a person to determine for himself whether or not to take potentially harmful drugs. The antipsychotic drugs dealt with in that case included the drug haldol, which was the drug about which the defendant physicians in the case *sub judice* failed to obtain informed consent or give any warning to the patient or her husband concerning material and harmful side effects.

In a footnote, the court in *Rogers* noted that "(f)oremost among them [harmful side effects] is tardive dyskinesia, a painful, disfiguring, and sometimes disabling neurological affliction which all parties in this case concede might be caused by the use of antipsychotic drugs." (footnote 1, page 653).

The malady contracted by Mrs. Bohatch in the instant case was a most horrifying type of tardive dyskinesia, known as tardive dystonia, which is painful as well as disfiguring.

The court in *Rogers* decided that:

> "... a person has a constitutionally protected interest in being left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs. The precise textual source in the Constitution of the protection of this interest is unclear, and the authorities directly supportive of the proposition itself are surprisingly few. Nevertheless, we are convinced that the proposition is correct and that a source in the Due Process Clause of the Fourteenth Amendment for the protection of this interest, most likely as part of the penumbral right to privacy, bodily integrity, or personal security (at 653).

The U.S. Supreme Court in *Mills v. Rogers*, 457 U.S. 291, 73 L. Ed. 2d 16, 102 S. Ct. 2442 (1982) vacated and remanded *Rogers v. Okin (supra)* to the Court of Appeals to consider an intervening state court decision bearing on the issue.

However, the Court recognized that the federal constitution defines only minimum rights and that the state may extend liberties. The extended substantive rights, if more expansive than the federal rights, would protect the person within that state.

B.

THE STATE OF OHIO VIOLATES A PATIENT'S ACCESS TO THE COURTS AND DEPRIVES HER OF PROPERTY WITHOUT DUE PROCESS OF LAW WHEN IT JUDICIALLY CREATES A LAW REQUIRING THE PATIENT IN INFORMED CONSENT MALPRACTICE CASES TO PROVE THAT ANY REASONABLE PERSON MUST HAVE REFUSED THE THERAPY IN ORDER TO RECOVER DAMAGES.

Due process encompasses, *inter alia*, the right of every person to have access to the courts to redress wrongs done (or allegedly done) to them, on a reasonable and fair basis.

As noted in *Jiron v. Mahlab*, 659 P.2d 311, 312 (NM 1983), "The right of access to the courts is one aspect of the right to petition. . . . A person should not be deprived of the right of access to the courts without due process of law."

See also, *California Transport v. Trucking Unlimited*, 404 U.S. 508, 30 L. Ed. 2d 642, 646, 92 S. Ct. 609 (1972) and also *Boddie v. Connecticut*, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971).

The court in *Jiron, supra*, noted that "when a statute or rule operates to deprive an individual of a protected right, it may be held constitutionally invalid as applied to that individual." (at 312).

Here, the petitioners sought redress and compensation for undergoing dangerous medical therapy without being informed of its inherent dangers and options with respect to the treatment. The state's denial deprives her of property without due process of law, in violation of Section 1, Article I, of the Ohio Constitution.

Ohio recognizes the right of a patient to have his informed consent secured before medical treatment or therapy is embarked upon. (See *Nickell, supra.*)

The right exists separate and apart from the reasonableness, *vel non,* of medical treatment.

As the Rhode Island Supreme Court noted in *Wilkinson v. Besey,* 295 A.2d 676, 685 (RI 1972): "One-half century ago, Justice Cardozo, in the oft-cited case of *Schloendorff v. Society of New York Hospital,* 211 N.Y. 125, 105 N.E. 92 (1914), made the following observation:

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages. (cites omitted) This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained. *Id.* at 129-130, 105 N.E. at 93.
>
> . . . This theory, which today is known as the doctrine of informed consent, imposes a duty upon a doctor which is completely separate and distinct from his responsibility to skillfully diagnose and treat the patient's ills."

The New Jersey court rejected, in *Cheung v. Cunningham, supra,* the so-called "objective patient test" and found that the test would be almost impossible to apply absent negligent medical treatment:

> The fault of the objective standard is that plaintiff must for all practical purposes prove that *any* reasonable person placed in the same position would necessarily withhold consent even though Plaintiff may have withheld consent and thereby have avoided an injury. This is the antithesis of the doctrine of informed consent which is intended to protect the individual patient's right to treatment." (at 833).

By effectively denying redress for lack of informed consent, Ohio has determined that a patient may not recover for injuries incurred by virtue of her not being informed unless she can also prove, contrary to the common-law basis of the doctrine, that the prescribed treatment was negligent, in and of itself.

As noted in *Cheung, supra,* if the prescribed therapy would be acceptable to any reasonable person, then this Plaintiff has no right to be told about the risks and dangers inherent in the therapy. This deprives her of the fundamental right of personal sovereignty over her own body, absent any countervailing consideration, whatsoever, either on the part of the state or medical profession, and, in so doing, denies her not only her fundamental right to privacy, but also access to a court (and, therefore, due process) to compensate her for the injury. Such a rule deprives her of her property, i.e. that right of redress which is her entitlement, in violation of Section 16, Article I, of the Ohio Constitution.

Ohio generally recognizes that its tort reform concepts must adhere to due process standards. Reviewing the concept of compulsory arbitration, the Court of Common Pleas of Montgomery County, Ohio, in *Simon v. St. Elizabeth Medical Center,* 3 Ohio Op. 3d 164 (1976), analyzed a series of cases and concluded that they stood "for the principle that when compulsory arbitration, [in]voluntarily imposed upon litigants, prevents them from presenting their dispute to the Courts and makes the decision of the arbitrator final with respect to the rights of the parties, the procedure is unconstitutional as a deprivation of property without due process of law in violation of the Fourteenth Amendment." See also *Dorchy v. Kansas,* 264 U.S. 286 (1924).

Thus, a patient's property right to recovery for violation of the very personal right to determine what is to be done to her body is denied by Ohio, thereby denying such person reasonable access to the courts, and, consequently, due process.

C.

THE STATE OF OHIO VIOLATES AND DENIES EQUAL PROTECTION WHEN IT SETS UP PHYSICIANS AS A PREFERRED CLASS OF FIDUCIARIES AND MALPRACTICE DEFENDANTS AND DISCRIMINATES AGAINST PATIENTS AS PLAINTIFFS IN INFORMED CONSENT MALPRACTICE CLAIMS AND BATTERY CLAIMS.

The law of Ohio also violates the equal protection clause of the Fourteenth Amendment and Section 2, Article I, of the Ohio Constitution as applied to patients in the position of Petitioner. Equal protection and protection of fundamental personal rights, if not two sides of the same coin, certainly stand very close together on the coin.

The concept of equal protection as applied to the personal sovereignty over one's own body requires the state to refrain from arbitrary and unreasonable classification of persons in the health care they receive. Thus, women cannot be discriminated against in health care matters (*Roe v. Wade, supra*) and, for example, single persons cannot be discriminated against compared to married persons regarding birth control information. See *Eisenstadt v. Baird*, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972).

In *Eisenstadt*, the Court elucidated the concept that "(i)f a state statute impinges upon fundamental freedoms protected by the Constitution, the statutory classification must, under the equal protection clause, be

not merely rationally related to a valid public purpose, but necessary to the achievement of a compelling state interest." (at syllabus 8).

The court in *Eisenstadt* relied, in part, upon *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 64 L. Ed. 989, 990, 40 S. Ct. 560 (1920) in finding that "(a) classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " The *Eisenstadt* case dealt with the fundamental right of privacy as it applies to the treatment of one's own body—in that case birth control.

The equal protection component of medical tort claims has been long understood in Ohio.

For example, the court in *Duren v. Suburban Community Hospital*, 24 Ohio Misc. 2d 25, 28 (1985), discussing certain types of "tort reform" statutes, stated that:

> ". . . (t)he various decisions which have held damage limitation statutes in medical malpractice cases as unconstitutional initially recognize this type of legislation as being a proper subject for legislative action. Both due process and equal protection arguments have been the basis of piercing the presumption of constitutionality of similar statutes and no valid purpose is served by recitation of each one of those cases.
>
> Simply stated, the legislative scheme of shifting responsibility for loss from one of the most affluent segments of society to those who are most unable to sustain that burden, *i.e.* horribly injured or maimed individuals, is not only inconceivable, but shocking to this court's conscience.

Using that language, the court held that the Ohio statute setting certain medical malpractice limitations on damages was unconstitutional under both federal and state constitutional precepts.

In holding certain Ohio statutes unconstitutional under the equal protection clause of the Fourteenth Amendment, the court in *Simon, supra,* stated that those laws "are violative of the equal protection clause contained in the Fourteenth Amendment of the United States Constitution ... in that these sections confer benefits on the medical malpractice defendant unavailable to other defendants in tort cases; thus, in effect, depriving plaintiffs in these cases of benefits available to others." (at 167).

The court's reasoning was grounded, in addition, on the fact that such actions are known at common law, so the imposition of unequal rules of recovery violates the equal protection clause. (at 170-171).

Another Ohio court, in *Graley v. Satayatham,* 74 Ohio Op. 2d 316, 319 (1976), applied the equal protection argument to tort reform for medical malpractice in the following language:

> "... (T)he General Assembly has ordained differential treatment for claimants in this type of personal injury tort actions from all other types of tort cases. The legislation in this respect collides with the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 2, of the Ohio Constitution. These constitutional provisions both mandate "equal protection" of the laws.
>
> This is not to say that separate classifications are, in all cases, constitutionally infirm; it is to say that separate classifications are invalid in circumstances where it is not demonstrable that a "compelling governmental interest" exists.

For example, in the common law in Ohio, and elsewhere, the application of medical treatment to a patient without his informed consent amounted to an assault and battery. See *Congrove v. Holmes,* 37 Ohio Misc. 95, 308 N.E.2d 765 (1973) and, *e.g., Shetter v. Rochelle,* 409 P.2d 74 (Ariz. 1965).

The Supreme Court of Louisiana noted this in *Karl J. Pizzalotto, M.D., Ltd. v. Wilson,* 437 So. 2d 859, 862 (La. 1983): "A surgeon commits a battery on his patient when he undertakes a particular surgical procedure without the consent of the patient or an authorized person, except when an emergency requires immediate surgery for the preservation of life or health under circumstances when such consent cannot be practicably obtained."

The Louisiana court also relied upon *Schloendorff, supra,* in Justice Cardozo's reasoning that the absence of informed consent to which every adult competent human is entitled amounts to a battery. (at 862).

The Ohio law supporting the "reasonable person" test of informed consent invidiously disadvantages patients. It creates a class of persons who are denied redress to the courts for a common law tort. With respect to informed consent, Ohio law effectively vitiates the need to tell the patient about material risks which may affect the patient's health, unless the proposed treatment would not be acceptable to any reasonable person. Obviously, treatment not acceptable to any reasonable person is negligent treatment, in and of itself. The only logical result of this reasoning is that the physician need not inform the patient about material risks to health inherent in any proposed therapy unless the therapy is so bad that no reasonable person would accept it.

Common law negligence is different from the tort of informed consent, since the physician may be liable for injury to a person who did not give his informed consent to treatment, even though the treatment itself was not negligently applied. The Ohio ruling effectively erases the right of a patient to have information about inherent dangers of any generally accepted treatment.

In addition, since informed consent was a requirement of the common law, the superimposition of the "reasonable man" standard, as opposed to a patient sovereignty standard, creates an arbitrary class by depriving plaintiffs in informed consent torts of the same protection of the law enjoyed by plaintiffs in other common law tort cases.

Specifically, with regard to the common law tort of assault and battery, plaintiffs in informed consent cases are deprived of equal protection of the law by the added requirement of proving that no reasonable man would accept the treatment. This creates a classification of persons whose rights are less protected than others so similarly situated, namely plaintiffs in assault and battery cases.

Finally, a protected class of professionals is created in physicians. As the court in *Cheung, supra*, noted (at 834):

> "It is to be recognized that there is a relationship akin to that of a fiduciary between doctor and patient. There is a clear danger in embracing the objective test espoused in *Skripek* and *Nicholl* that the doctor knowing the patient would not elect treatment if advised of the risks may withhold such advice and yet escape liability because of a determination that a reasonably prudent person in plaintiff's position would have elected treatment or surgery if fully informed. Such a breach of fiduciary

relationship would result in liability of other professionals. *In re Dolan*, 76 N.J. 1, 9, 384 A.2d 1076 (1978) (attorney-client); *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 553, 236 A.2d 843 (1967) (real estate brokers-principals).

It would be similar to saying that the fiduciary and trusted advisor becomes the principal in deciding what risks are to be taken.

Does then a lawyer advising a client in a matter take it upon himself to make the decision for the client, without informing the client of the risks and options, and escape liability for his pre-emptive decision? The answer is clearly, "No". See *Smith v. Patterson*, Supreme Court Commission of Ohio, December Term, 1877, Page 70.

The same is true of architects and other professionals. See *Connelly v. Balkwill*, 174 F. Supp. 49 (N.D. OH 1959).

By creating a privileged class of fiduciaries in physicians, the Ohio Supreme Court has created an underprivileged class of beneficiaries in their patients.

According to the U.S. Court of Appeals for the Sixth Circuit, in *Sexton v. Barry*, 1 Ohio Op. 2d 231 (1956), "(t)he equal protection of law implies that all litigants similarly situated may appeal to courts for both relief and defense under like conditions, with like protections, and without discrimination (at syllabus 10).

Ohio's insistence that a "reasonable person", rather than the actual patient, determines informed consent is clearly a denial of equal protection, in violation of the Fourteenth Amendment to the United States Constitution, and Section 2, Article I of the Ohio Constitution, and constitutes an invidious and impermissible discrimination.

Ohio's informed consent law, as espoused by its Supreme Court in *Nickell v. Gonzalez, supra*, violates the patient's right to privacy, due process and equal protection guaranteed by the Fifth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 2, 7 and 16, of the Ohio Constitution.

CONCLUSION

For these reasons, this Petition for Certiorari should be granted in its entirety.

Respectfully submitted,

EUGENE A. LUCCI, *Counsel of Record*
WALTER J. MCNAMARA III
MCNAMARA, LUCCI & LOXTERMAN
7200 Center Street, Suite 300
Mentor, Ohio 44060-4900
(216) 974-1119 953-9455

Counsel for Petitioners
William Bohatch and
Patricia Bohatch

APPENDIX

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY RECORD

(Dated November 9, 1988)

Case No. 88-1455

THE SUPREME COURT OF OHIO
COLUMBUS

PATRICIA BOHATCH, *et al.*,
Appellants,

v.

CHARLOTTE V. DELHAES, M.D., *et al.*,
Appellees.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Lake County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Eugene Lucci.

/s/ THOMAS J. MOYER
Chief Justice

JUDGMENT ENTRY OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Filed June 20, 1988)

Case No. 12-066

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

PATRICIA BOHATCH, *et al.*,
Appellants,

vs.

CHARLOTTE V. DELHAES, M.D., *et al.*,
Appellees.

JUDGMENT ENTRY

For the reasons stated in the Opinion of this Court, each assignment of error is overruled, and it is the judgment and order of this Court that the judgment of the trial court is affirmed.

/s/ ROBERT E. COOK
Judge

FOR THE COURT

(FORD, *P.J.*, concurs with Concurring Opinion; CHRISTLEY, *J.*, concurs in judgment only.)

OPINION OF THE COURT OF APPEALS OF LAKE COUNTY, OHIO

(Filed June 20, 1988)

Case No. 12-066

COURT OF APPEALS

ELEVENTH DISTRICT
LAKE COUNTY, OHIO

PATRICIA BOHATCH, *et al.*,
Plaintiffs-Appellants,

vs.

CHARLOTTE V. DELHAES, M.D., *et al.*,
Defendants-Appellees.

JUDGES:

HON. DONALD R. FORD, *P.J.*
HON. ROBERT E. COOK, *J.*
HON. JUDITH A. CHRISTLEY, *J.*

CHARACTER OF PROCEEDINGS:

Civil Appeal from the Court of Common Pleas Case No. 85 CIV 1078

JUDGMENT:

Affirmed.

OPINION

COOK, *J.*

During the spring of 1983, Patricia Bohatch developed a psychiatric condition manifested by severe depression and thoughts of suicide. She was admitted to

The Cleveland Clinic on May 27, 1983 and put under the care of Dr. A. Dixon Weatherhead, a psychiatrist. Dr. Weatherhead prescribed both electro-convulsive therapy (ECT) and drug therapy which included the use of haldol, an anti-psychotic drug. Due to Mrs. Bohatch's mental state, no consent was obtained from her for the ECT treatment or the drug treatment. The use of haldol seemed to cause Mrs. Bohatch's condition to improve.

On June 28, 1983, Mrs. Bohatch was released from the clinic into the care of the Lake County Mental Health Center and Dr. Charlotte V. Delhaes, its psychiatrist. The drug therapy continued. In November 1983, Mrs. Bohatch began to show a slight abnormal movement of her upper torso and, in January 1984, she began to show noticeable signs of an abnormal muscular movement. She again sought care at The Cleveland Clinic where she was diagnosed as suffering from tardive dyskinesia, also referred to as tardive dystonia.

Mrs. Bohatch and her husband, William, filed a civil action against The Cleveland Clinic Foundation, Dr. Weatherhead, the Lake County Mental Health Center and Dr. Delhaes for medical malpractice, primarily alleging they prescribed a course of drug treatment for her psychiatric problems without first securing her informed consent and said drug treatment, the use of haldol, caused her to suffer from tardive dystonia, a rare form of muscular movement disorder. The defendants filed answers denying the allegations of the complaint.

After a week long trial, the jury returned a verdict in favor of all the defendants. Judgment was entered on June 9, 1986. The Bohatchs' motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial was overruled.

The Bohatchs have appealed the judgment of the trial court and have filed the following three assignments of error:

> "1. The trial court erred to the prejudice of plaintiffs in failing to instruct the jury that the applicable standard in informed consent cases is patient-subjective rather than objective.
>
> "2. The trial court erred to the prejudice of plaintiffs in denying plaintiffs' motion for directed verdict at the end of Lake County Mental Health's case and at the end of the trial and plaintiffs' motion for judgment notwithstanding the verdict or for new trial.
>
> "3. The jury disregarded the instructions of the trial court, and the verdict was against the manifest weight of the evidence."

The assigned errors are without merit.

The Bohatchs first contend that the trial court erred in instructing the jury that the standard it should apply in an informed consent case, such as the instant cause, is whether a reasonably careful person would not have consented to the treatment or procedure if the risks of injury from such treatment or procedure had been disclosed. They argue that the instruction should have framed the issue in terms of whether the patient would have decided against the therapy had the risks and damages of the treatment been explained to her prior to the therapy.

In *Nickell v. Gonzalez* (1985), 17 Ohio St. 3d 136, the Ohio Supreme Court defined the tort of lack of informed consent when it held:

"*** The tort of lack of informed consent is established when:

"(a) The physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any;

"(b) the unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate cause of the injury to the patient; and

"(c) a reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy."

In *Nickell*, the court clearly held that the standard to apply in an informed consent case is the objective reasonable person standard rather than the subjective patient standard, as alleged by the Bohatchs.

In addition, a review of the record indicates that the Bohatchs did not object to the subject instruction. Therefore, the Bohatchs may not assign as error the court's giving of the subject instruction. *Schade v. Carnegie Body Co.* (1982), 70 Ohio St. 2d 207; Civ. R. 51(A).

The Bohatchs' second contention is that the court erred in denying their motions for a directed verdict at the end of the defendants' evidence and at the close of all the evidence and their motion for judgment notwithstanding the verdict. They argue that the evidence offered by defendants conceded that haldol

caused Patricia Bohatch's movement disorder and that no consent was given by the Bohatchs prior to or during the haldol treatment of her psychiatric condition.

In the instant case, there is no dispute in the evidence that defendants failed to disclose to Mrs. Bohatch and discuss with her the "material risks and dangers inherently and potentially involved with respect to" haldol, a proposed therapy for her condition. Nor is there any dispute that the "unrevealed risks and dangers *** actually materialized and are the proximate cause of the injury to" Mrs. Bohatch. However, the evidence was such that reasonable minds could have reached different conclusions as to whether "[a] reasonable person in the position of" Mrs. Bohatch would have decided against the use of haldol as therapy for her mental condition.

As a matter of law, the evidence was sufficient to take the case to the jury. Since the sufficiency of the evidence is the test as to both a motion for a directed verdict and for judgment notwithstanding the verdict, we conclude the trial court did not err in overruling the Bohatchs' motions for a directed verdict and for judgment notwithstanding the verdict.

The Bohatchs' third contention is that the jury disregarded the instructions of the court and that the verdict was against the manifest weight of the evidence. They argue that, because the evidence before the jury was "unconflicting," obviously the jury "disregarded, misunderstood, or forgot" the court's instructions. They further conclude that, accordingly, the jury rendered judgment against the manifest weight of the evidence.

However, as stated earlier, the evidence presented a jury question as to what a reasonable person in Mrs. Bohatch's position would have decided, as to the use of haldol, if the risk and dangers of said drug had been explained to her. There was evidence to support the jury's verdict.

The jury did not disregard the instructions of the court and the judgment was not against the weight of the evidence.

Judgment affirmed.

/s/ ROBERT E. COOK
Judge

FORD, *P.J.*, concurs with Concurring Opinion,

CHRISTLEY, *J.*, concurs in judgment only.

Case No. 12-066

COURT OF APPEALS

ELEVENTH DISTRICT
LAKE COUNTY

PATRICIA BOHATCH, *et al.*,
Plaintiffs-Appellants,

vs.

CHARLOTTE V. DELHAES, M.D., *et al.*,
Defendants-Appellees.

JUDGES:
HON. DONALD R. FORD, *P.J.*
HON. ROBERT E. COOK, *J.*
HON. JUDITH A. CHRISTLEY, *J.*

CONCURRING OPINION

FORD, *P.J.*

I concur in judgment only because of the majority's failure to address the stated issue of appellants' motion for a new trial, and its de minimus treatment and analysis of appellants' second assignment of error.

/s/ DONALD R. FORD
Judge

Case No. 12-066

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

PATRICIA BOHATCH, *et al.*,
Appellants,

vs.

CHARLOTTE V. DELHAES, M.D., *et al.*,
Appellees.

ERRATA

This Court's Opinion and Judgment Entry of June 20, 1988, in the above-captioned matter, is corrected to reflect that Donald R. Ford, Presiding Judge, *concurred in judgment only with concurring opinion.*

/s/ ROBERT E. COOK
Judge

FOR THE COURT

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed June 9, 1986)

Case No. 85 CIV 1078

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

PATRICIA BOHATCH, *et al.*,
Plaintiffs,

vs.

CHARLOTTE V. DELHAES, M.D., *et al.*,
Defendants.

JUDGMENT ENTRY

This cause came on for trial by a jury of the issues upon plaintiff's complaint.

The jury returned a verdict in favor of defendants, Charlotte V. Delhaes, M.D., Lake County Mental Health, Dr. A. Dixon Weatherhead and Cleveland Clinic Foundation. The jury was thereupon discharged.

WHEREFORE, it is the order of this Court that judgment be entered in favor of defendants, Charlotte V. Delhaes, M.D., Lake County Mental Health, Dr. A. Dixon Weatherhead and Cleveland Clinic Foundation.

It is further the order of this Court that plaintiffs pay the costs of this action.

IT IS SO ORDERED.

/s/ PAUL H. MITROVICH
Judge

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held in answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF OHIO

ARTICLE I: BILL OF RIGHTS

§1 Right to freedom and protection of property.

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety. (See Const 1802, Art VIII, §1.)

§2 Right to alter, reform, or abolish government, and repeal special privileges.

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly. (See Const 1802, Art VIII, §1.)

§7 [Rights of conscience; education; necessity of religion and knowledge.]

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense

with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction. (See Const 1802, Art VIII, §§3, 25.)

§16 [Redress in courts.]

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

NICKELL, ET AL. V. GONZALEZ

SUPREME COURT, JANUARY TERM, 1985

NICKELL, *et al., Appellants, v.* GONZALEZ, *Appellee.*

[Cite as Nickell *v.* Gonzalez (1985), 17 Ohio St. 3d 136.]

Malpractice—Physicians—Tort of lack of informed consent established, when.

O.Jur 2d Physicians and Surgeons §124.

The tort of lack of informed consent is established when:

(a) The physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any;

(b) the unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate cause of the injury to the patient; and

(c) a reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy.

(No. 84-650—Decided May 22, 1985.)

PRESLEY V. CITY OF NORWOOD

PRESLEY, *Appellant* v. CITY OF NORWOOD, *Appellee.*

36 OhioSt.2d 29.
65 O.O.2d 129

Supreme Court of Ohio.

(No. 73-51—Decided October 31, 1973.)

Trial—Instruction to jury—Request for inclusion of correct law—Failure to formally object—Civil Rule 51(A).

Judgment of Court of Appeals reversed.

1. *Trial* Page §172.
   Trial O.Jur 2d §219.1

Where the record affirmatively shows that a trial court has been fully apprised of the correct law governing a material issue in dispute, and that the complaining party has unsuccessfully requested the inclusion of that law in the trial court's charge to the jury, such party does not waive his objections to the court's charge by failing to *formally* object thereto. (Civ. R. 51(A).)

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS

* * * * *

[634] MR. CIANO: As long as they're written.

MR. LUCCI: It's written. They're not page numbered but that's the order.

Gentlemen, what I have submitted is the exact thing that's in 331.04 of the Ohio Jury Instructions except for certain modifications. And the basis for those, I prefer to present this in the form of a written request.

MR. CIANO: Does this have to be on the record?

THE COURT: Well, all right, as long as we have the motions on the record.

MR. CIANO: This doesn't have to be on the record until he overrules it, then he'll give the reasons.

THE COURT: We'll take that up first thing tomorrow morning.

* * * * *

BRIEF IN SUPPORT OF PLAINTIFFS' PROPOSED JURY INSTRUCTIONS

(Filed June 6, 1986)

Case No. 85-CIV-1078

IN THE COURT OF COMMON PLEAS

LAKE COUNTY, OHIO

PATRICIA BOHATCH, *et al.*,
Plaintiffs,

vs.

CHARLOTTE V. DELHAES, M.D., *et al.*,
Defendants.

There are two parts to the obtaining of a valid informed consent from a patient, and the second part is often overlooked, especially by the physician. The first part, the requirement of the physician's disclosure, has already been set forth in Plaintiffs' Trial Brief. The second, and *equally* important part, is the patient's consent, for disclosure without a patient's consent cannot constitute a valid informed consent.

The standard on this issue of proximate cause is patient-subjective. The reasonable man standard is not applicable in determining in a malpractice action against a physician, whether the patient would have consented to the proposed treatment if given full disclosure. *Scott vs. Bradford,* 606 P.2d 554, 559 (Okla., 1980).

A causal connection between the physician's breach of the duty to disclose and the patient's injury exists when and only when disclosure of a material risk incidental to treatment would have resulted in a decision by the patient against it.

Ohio Jury Instruction (O.J.I.) 331.04 concerning lack of informed consent (common law), is in error and misleading to the extent that it requires a reasonable man standard on the issue of the patient's consent. The O.J.I. uses the language, "a reasonably careful person would not have consented to the treatment if he had known of those risks." According to the Comment following the instruction, this instruction on the law was derived from the District of Columbia Circuit case of *Canterbury vs. Spence,* 464 F.2d 772 (D.C. Cir., 1972). However, the issue of consent as used in *Canterbury* and similar cases (for example, *Miller v. Kennedy,* 522 P.2d 852 (Wash., 1974)) and the Ohio cases on the subject are distinguishable.

As described in *Siegel vs. Mt. Sinai Hospital of Cleveland,* 62 O.App.2d 12, 16 O.O.3d 54 (1978); *Ware vs. Richey,* 14 O.App.3d 3 (1983); *Congrove vs. Holmes,* 66 O.O.2d 295, 37 O.Misc. 95 (1973); *Bruni vs. Tatsumi,* 46 O.S.2d 127, 75 O.O.2d 184 (1976), this consent factor (also enumerated in Section A4 of Plaintiffs' Trial Brief) is proved under Ohio law:

> When *the patient* would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him prior to the therapy.

Cases from other jurisdictions (for example, *Miller, supra*), which employ the reasonable man standard for consent, utilize the following language as the corresponding element of proximate causation:

> A *reasonable, prudent patient probably* would not have consented to the treatment when informed of the material risks.

The language utilized in cases such as *Miller,* and other jurisdictions, utilize the reasonable prudent patient standard, which is quite different from the Ohio cases, which actually utilize a language indicating that the *patient-plaintiff* would have not consented; however, even in *Miller,* the language "*probably* would not have consented" is utilized, implying that this need not be proved to a virtual certainty in the jury's mind. Contrast this to the Ohio Jury Instruction utilizing language that a "reasonably careful person *would not* have consented". O.J.I. obviously requires too much; surely the doctrine of informed consent is not merely intended to protect the patient's right to decline only that treatment which it would be irresponsible to accept, or put conversely, which would constitute malpractice for the physician to propose. Plaintiffs' proposed jury instruction on informed consent is separately submitted to the court for including in its charge to the jury.

The Court in *Scott v. Bradford, supra,* at 558, discussed in detail the rationale for utilization of the patient-subjective approach rather than the reasonable man approach and is critical of the *Canterbury* rule:

> The Court in *Canterbury v. Spence, supra,* although emphasizing principles of self-determination permits liability only if non-disclosure would have affected the decision of a fictitious "reasonable patient," even though actual patient testifies he would have elected to forego therapy had he been fully informed.

Decisions discussing informed consent have emphasized the *disclosure* element but paid scant attention to the consent element of the concept, although this is the root of causation. Language in some decisions suggest the standard to be applied is a subjective one, i.e., whether that particular patient would still have consented to the treatment, reasonable choice or otherwise. (citations)

Although the *Canterbury* rule is probably that of the majority, its "reasonable man" approach has been criticized by some commentators as backtracking on its own theory of self-determination. The *Canterbury* view certainly severely limits the protection granted an injured patient. To the extent the plaintiff, given an adequate disclosure, would have declined the proposed treatment, and a reasonable person in similar circumstances would have consented, a patient's right of self-determination is *irrevocably lost.* This basic right to know and decide is the reason for the full-disclosure rule. Accordingly, we decline to jeopardize this right by the imposition of the "reasonable man" standard.

If a plaintiff testifies he would have continued with the proposed treatment had he been adequately informed, the trial is over under either the subjective or objective approach. If he testifies he would not, then the causation problem must be resolved by examining the credibility of plaintiff's testimony. The jury must be instructed that it must find plaintiff would have refused the treatment if he is to prevail.

Although it might be said this approach places a physician at the mercy of a patient's hindsight, a careful practitioner can always protect himself by

> insuring that he has adequately informed each patient he treats. If he does not breach this duty, a causation problem will not arise.

Therefore, consistent with the Ohio decisions in this respect, the standard is, and should be, the plaintiff-patient subjective standard, requiring that this particular patient would have chosen no treatment, or a different course of treatment, as an alternative had the material risk of each been made known to him.

Defendants have urged this Court to charge the jury with O.J.I. 331.04, referred to above, on the ground that it is the law of Ohio as pronounced in *Nickell vs. Gonzalez,* 17 O.S.3d 136 (1985), where the syllabus states, in part:

> (c) a reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy.

Plaintiffs' counsel herein respectfully submits to this Court that the Supreme Court in *Nickell* inadvertently inserted the words "reasonable person . . . would have decided against the therapy . . ." raising the Ohio standard as previously adopted by Ohio courts from that of patient-subjective to that of unreasonably objective. As evidence of this, the Supreme Court states that the syllabus pronounced in *Nickell* comes from the holdings and dictum of the *Bruni, Siegel,* and *Congrove* cases.

Bruni states, at 189:

> . . . (3) that causality exists only when the disclosure of significant risks incidental to treatment would have resulted in *the patient's decision* against that treatment. (Emphasis added).

The Supreme Court in *Bruni* mentions *Canterbury vs. Spence*, and does not state that a reasonable person standard is to be used, rather the element of causation is whether this plaintiff-patient would have refused consent. The Court in *Ware vs. Richey* states the same in its syllabus.

The *Siegel* Court, in addressing this issue, stated, at 60:

> . . . (4) when *the patient* would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him prior to therapy. (Emphasis added).

The Court in *Siegel* did not use the "reasonable person" standard, but instead used the subjective patient-plaintiff standard. The *Siegel* Court also cited the cases of *Canterbury, supra*, and *Congrove, supra*, with approval.

The *Congrove* Court, at 299, states:

> Each man is considered to be the master of his own body and he may, if he so desires, expressly prohibit the performance of lifegiving surgery, or other medical treatment, and while a doctor might well believe that an operation or form of treatment is necessary, the law does not permit him to substitute his own judgment for that of the patient.

The *Congrove* Court, at 300, states:

> A patient has the sovereign choice of whether he will submit to surgery in the course of the diagnosis and treatment . . . the duty to disclose serious risks should not be based upon the doctor's practices but upon the patient's need for full disclosure . . .

Language such as that used in the *Congrove* Court bespeaks of this patient's choice. Any language in an instruction which substitutes the decision of a fictitious "reasonable person" vitiates the patient's "sovereign choice".

If any of the above stated Courts thought or desired to introduce a reasonable man standard into Ohio law, they would have said so, especially where such was germane to the issues before that Court in those cases.

Where the patient is incapable of receiving the disclosure and incapable of knowledgeably and intelligently consenting to the procedure, and where there exists a close and supportive relative, such as the patient's spouse, consistent with the underlying premise for the informed consent doctrine, and the leading cases, such as *Canterbury v. Spence, supra,* the informed consent should be secured from that patient's spouse or supportive relative. *Dawes vs. Indian Health Service,* 504 F.Supp. 203 (S.D., 1980). Except for the plaintiff-patient, who more than the patient's spouse would have to live with the consequences of the decision, pay the expenses and suffer the materialization of the adverse results, and be actually deprived of the consortium of the plaintiff-patient?

EUGENE A. LUCCI
Attorneys for Plaintiffs

PROOF OF SERVICE

A copy of the foregoing was hand-delivered to Defendants' Counsel June 6, 1986.

EUGENE A. LUCCI
Attorneys for Plaintiffs

FILED
MAR 4 198
JOSEPH F. SPANIO
CLERK

(2)

No. 88-1302

IN THE

Supreme Court of the United States

October Term, 1988

PATRICIA BOHATCH, *et al.*,
Petitioners,

vs.

CHARLOTTE V. DELHAES, M.D., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

OPPOSING BRIEF OF RESPONDENTS A. DIXON WEATHERHEAD, M.D. and THE CLEVELAND CLINIC FOUNDATION

IRENE C. KEYSE-WALKER, *Counsel of Record*
GEORGE GORE
EDWARD S. JERSE
ARTER & HADDEN

1100 Huntington Building
Cleveland, Ohio 44115
(216) 696-1100

Counsel for Respondents
A. Dixon Weatherhead, M.D. and
The Cleveland Clinic Foundation

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should review petitioners' constitutional challenge to an Ohio law where the challenge was never raised below or considered by the courts of Ohio?

II. Whether the use of an objective standard for determining causation in an informed consent action violates petitioners' rights to privacy, due process or equal protection?

II.

LIST OF PARTIES AND RULE 28.1 STATEMENT

Respondent The Cleveland Clinic Foundation ("Clinic") is a 501(c)(3) not-for-profit corporation located in Cleveland, Ohio.[1] Respondent A. Dixon Weatherhead, M.D. ("Dr. Weatherhead") is a physician who treated petitioner Patricia Bohatch at the Clinic. Following her treatment at the Clinic, petitioner Patricia Bohatch was treated by respondent Charlotte Delhaes, M.D. at the Lake County Medical Center.

[1] The Clinic is affiliated with the Cleveland Clinic Florida, located in Ft. Lauderdale, Florida.

TABLE OF CONTENTS

Questions Presented for Review. I

List of Parties and Rule 28.1 Statement II

Table of Authorities. IV

Statement of the Case. 1

Reasons Why the Petition Should Be Denied 4

A. Petitioners Waived Their Constitutional Claims By Failing To Raise Them In Any Of The Three Lower Courts Reviewing The Case 4

B. Ohio's Application Of An Objective Standard In Determining Causation In An Informed Consent Case Did Not Violate Petitioners' Constitutional Rights 5

Conclusion 8

TABLE OF AUTHORITIES

Cases

Bankers Life & Cas. Co. v. Crenshaw, _____ U.S. _____, 108 S. Ct. 1645 (1988) 4

Bowers v. Garfield, 382 F. Supp. 503 (D. Pa. 1974).. 6

Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972). 6

Cobbs v. Grant, 502 P.2d 1 (S.Ct. Calif. 1972) 6

Cunningham v. United States, 683 F.2d 847 (4th Cir. 1982) 6

Dessi v. United States, 489 F. Supp. 722 (D. Va. 1980) 6

Fogal v. Genesee Hospital, 344 N.Y.S.2d 552 (N.Y. App. 1973) 6

Funke v. Fieldman, 512 P.2d 539 (S.Ct. Kan. 1973) . 6

Hamilton v. Hardy, 549 P.2d 1099 (Colo. App. 1976) 6

Hartke v. McKelway, 707 F.2d 1544 (D.C. Cir. 1933) 6

Karp v. Cooley, 493 F.2d 408 (5th Cir. 1974) 6

Miller v. Kennedy, 522 P.2d 852 (Wash. App. 1974) . 6

Nickell v. Gonzalez (1985), 17 Ohio St. 3d 136..... 5

Sard v. Hardy, 379 A.2d 1014 (Md. App. 1977)..... 6

Scaria v. St. Paul Fire and Marine Ins. Co., 227 N.W.2d 647 (S.Ct. Wisc. 1975)..... 6

Webb v. Webb, 451 U.S. 493 (1981)..... 4

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-1302

PATRICIA BOHATCH, *et al.*,
Petitioners,

vs.

CHARLOTTE V. DELHAES, M.D., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT, LAKE COUNTY, OHIO

OPPOSING BRIEF OF RESPONDENTS A. DIXON WEATHERHEAD, M.D. AND THE CLEVELAND CLINIC FOUNDATION

STATEMENT OF THE CASE

On admission to the Clinic on May 27, 1983, Petitioner Patricia Bohatch was psychotic, delusional, hallucinatory and suicidal. Dr. Weatherhead commenced short term administration of a very low dose of the drug

Haldol. Haldol is a neuroleptic drug prescribed to relieve the symptoms of certain psychoses, including the paranoia and delusional thinking suffered by Mrs. Bohatch. It was the drug of choice and no drug alternative existed that did not have similar risks.

Dr. Weatherhead did not discuss the possible side effects of Haldol with Mrs. Bohatch prior to commencing administration of the drug because he considered her severely psychotic and incapable of understanding any questions about the effects of the medication. He further did not believe it would be in Mrs. Bohatch's best interest to discuss the therapy or anything of a confidential nature with Mr. Bohatch, who the doctor believed might be part of Mrs. Bohatch's problem.

When Haldol was discontinued during her admission, Mrs. Bohatch relapsed into severe paranoia. Administration of the drug was resumed with beneficial results. On discharge, Dr. Weatherhead informed Mrs. Bohatch that, if she did not take Haldol, she probably would suffer a relapse of her psychosis and develop again the morbid depression, intense guilt and paranoid delusions she previously suffered. He advised her to seek medical attention if she developed any side effects or inexplicable symptoms.

Six months after her discharge from the Clinic, Mrs. Bohatch developed a rare movement disorder called tardive dystonia. At trial, Respondents produced expert testimony that Haldol was properly prescribed and critical for controlling Mrs. Bohatch's psychotic, suicidal symptoms. The jury returned a defense verdict.

Petitioners appealed, but did not raise any constitutional issues. Petitioners argued that an improper jury instruction was given on informed consent; that the trial court erred in denying motions for

a directed verdict and for judgment notwithstanding the verdict; and that the jury verdict was against the manifest weight of evidence. Affirming the judgment, the Court of Appeals found that Petitioners waived any objection to the jury instructions which, in any event, properly stated the law of Ohio on informed consent. The Court found that the case was properly submitted to the jury and that the evidence was sufficient to support the jury's verdict.

On appeal to the Ohio Supreme Court, Petitioners raised essentially the same issues and made no federal claims. The Ohio Supreme Court declined to accept jurisdiction. Petitioners then filed a Petition for Writ of Certiorari in this Court arguing, for the first time, that Ohio's informed consent law is violative of the Ninth and Fourteenth Amendments of the United States Constitution.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition should be denied because Petitioners failed to preserve the constitutional issues on appeal and because Ohio's law on informed consent is constitutional.

A.

PETITIONERS WAIVED THEIR CONSTITUTIONAL CLAIMS BY FAILING TO RAISE THEM IN ANY OF THE THREE LOWER COURTS REVIEWING THE CASE.

Petitioners raise for the first time in this Court a challenge to the constitutionality of Ohio's common law of informed consent. Petitioners did not raise a constitutional challenge in the trial court, the Ohio Court of Appeals or the Ohio Supreme Court. The federal claims have been waived and should not be considered by the United States Supreme Court.

It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Webb v. Webb*, 451 U.S. 493, 496-497 (1981). Principles of comity in the federal system require that the state courts be afforded the opportunity to perform their duty and this Court has consistently refused to decide federal constitutional issues raised here for the first time. *Id.* at 499; *see also Bankers Life & Cas. Co. v. Crenshaw*, _____ U.S. _____, 108 S. Ct. 1645 (1988).

At no stage of the proceedings below did Petitioners raise a constitutional challenge or even refer to the constitutional provisions on which they base their petition. The courts of Ohio have not considered any constitutional challenge and no record has been developed for consideration in this Court. The federal claims were not preserved and the petition should be denied.

B.

OHIO'S APPLICATION OF AN OBJECTIVE STANDARD IN DETERMINING CAUSATION IN AN INFORMED CONSENT CASE DID NOT VIOLATE PETITIONERS' CONSTITUTIONAL RIGHTS.

Even if their federal claims were not waived, Petitioners fail to raise a legitimate constitutional issue before this Court. Under Ohio law, the tort of lack of informed consent is established when:

(a) The physician fails to disclose to the patient and discuss the material risks inherently and potentially involved with respect to the proposed therapy if any;

(b) The unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate of the injury to the patient; and

(c) A reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy.

Nickell v. Gonzalez (1985), 17 Ohio St. 3d 136.

The objective standard applied in determining causation is not a limitation of personal right but rather a fair and practical means of deciding the causation issue after a claim is made. Since the landmark decision of the United States Circuit Court for the District of Columbia in *Canterbury v. Spence*, 464 F.2d 772, 790 (D.C. Cir. 1972), courts throughout this country have adopted the objective standard and expressly rejected the subjective standard advanced by Petitioners.[2]

A subjective standard "ignores the practical problem with reliability of proof" (*Dessi v. United States*, 489 F. Supp. 722, 729 (D.Va. 1980)) and ultimately turns on the credibility of the hindsight of a person seeking recovery after he has experienced a most undesirable result. *Sard v. Hardy*, 379 A.2d 1014, 1025 (Md. App. 1977). *See also Cobbs v. Grant*, 502 P.2d 1, 11 (S.Ct. Calif. 1972).

> Since at the time of the trial the uncommunicated hazard has materialized, it would be surprising if the patient-plaintiff did not claim that had he been informed of the dangers, he would have declined treatment. Subjectively he may believe so with the 20/20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment.

Cobbs, 502 P.2d at 11.

---

[2] *See Cobbs v. Grant*, 502 P.2d 1, 11-12 (S.Ct. Calif. 1972); *Fogal v. Genesee Hospital*, 344 N.Y.S.2d 552, 560 (N.Y. App. 1973); *Funke v. Fieldman*, 512 P.2d 539, 549-50 (S.Ct. Kan. 1973); *Bowers v. Garfield*, 382 F. Supp. 503, 506 (D. Pa. 1974); *Karp v. Cooley*, 493 F.2d 408, 422 n.18 (5th Cir. 1974); *Miller v. Kennedy*, 522 P.2d 852, 864 (Wash. App. 1974); *Scaria v. St. Paul Fire and Marine Ins. Co.*, 227 N.W.2d 647 (S.Ct. Wisc. 1975); *Hamilton v. Hardy*, 549 P.2d 1099, 1105 (Colo. App. 1976); *Sard v. Hardy*, 379 A.2d 1014 (Md. App. 1977); *Dessi v. United States*, 489 F. Supp. 722, 729 (D. Va. 1980); *Cunningham v. United States*, 683 F.2d 847 (4th Cir. 1982); *Hartke v. McKelway*, 707 F.2d 1544, 1550 (D.C. Cir. 1983).

The absolute sovereignty invoked by Petitioners simply is not realistic. If sovereignty is the only goal, a physician would be required to disclose all potential risks, however obscure and immaterial. Even then, a doctor would not satisfy the idiosyncratic patient whose fears may be irrational and unknowable. Inevitably, the only solution is a reasonableness standard.

The informed consent law of Ohio and the majority of states does not deprive an individual of privacy or due process or establish a favored class of defendants. The petition should be denied.

CONCLUSION

The federal claims advanced by Petitioners are raised for the first time before this Court. The claims were waived by Petitioners' failure to raise them below. The claims, moreover, lack substantive merit. Nothing in the opinions below merits this Court's review.

Respectfully submitted,

IRENE C. KEYSE-WALKER, *Counsel of Record*
GEORGE GORE
EDWARD S. JERSE
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115
(216) 696-1100

Counsel for Respondents
A. Dixon Weatherhead, M.D. and
The Cleveland Clinic Foundation

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-1302

In The

Supreme Court of the United States

October Term, 1988

PATRICIA BOHATCH, *et al.*,

Petitioners,

vs.

CHARLOTTE V. DELHAES, M.D., *et al.*,

Respondents.

On Petition For a Writ of Certiorari to the Court of Appeals, Eleventh Appellate District Lake County, Ohio

OPPOSING BRIEF OF RESPONDENTS CHARLOTTE V. DELHAES, M.D. and THE LAKE COUNTY MENTAL HEALTH CENTER

GARY H. GOLDWASSER,
Counsel of Record
THOMAS R. KELLY
REMINGER & REMINGER Co., L.P.A.

113 St. Clair Avenue, N.E.
Cleveland, Ohio 44114-1273
(216) 687-1311

Counsel for Respondents Charlotte V. Delhaes, M.D. and The Lake County Mental Health Center

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should review Petitioners constitutional challenge to an Ohio law when the challenge was neither raised in the Ohio trial or Appellate courts, nor considered by those courts?

II. Whether the determination of causation in an informed consent action through the use of an objective standard violates Petitioner's right to privacy, due process or equal protection?

LIST OF PARTIES AND RULE 28.1 STATEMENT

Respondent the Lake County Mental Center ("Mental Center") is a 501(C)(3) not-for-profit corporation located in Mentor, Ohio. Respondent Charlotte V. Delhaes, M.D. ("Doctor Delhaes") is a physician who treated Petitioner Patricia Bohatch at the medical center. Prior to her treatment at the medical center, Petitioner Patricia Bohatch was treated by Respondent A. Dixon Weatherhead at the facilities of Respondent Cleveland Clinic Foundation. Rule 28.1 does not otherwise apply.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES AND RULE 28.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	4
A. Petitioners Fail to Raise Any Federal Questions or Constitutional Claims in any of the Ohio Courts Adjudicating or Reviewing the Case, and Therefore This Court has no Jurisdiction to Review any Such Federal Questions or Constitutional Claims	4
B. Petitioners' Constitutional Rights Were Not Violated by Ohio Court's Application of an Objective Standard in Determining Causation in an Informed Consent Case	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

	Page
Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972)	8
Cobbs v. Grant, 502 P.2d 1 (S.Ct. Calif. 1972)	8
Dessi v. United States, 49 F. Supp. 722 (D.Va. 1980)	8
Nickell v. Gonzalez, 17 Ohio St.3d 136 (1985)	6, 7
Sard v. Hardy, 379 A.2d 1014 (MD App. 1977)	8
Southwestern Bell Telephone Company v. State of Oklahoma, 303 U.S. 206, 82 L.Ed. 757, 58 S.Ct. 528 (1938)	5
Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 396, 101 S.Ct. 1889 (1981)	5

No. 88-1302

In The

Supreme Court of the United States

October Term, 1988

PATRICIA BOHATCH, *et al.*,

Petitioners,

vs.

CHARLOTTE V. DELHAES, M.D., *et al.*,

Respondents.

On Petition For a Writ of Certiorari to the Court of Appeals, Eleventh Appellate District Lake County, Ohio

OPPOSING BRIEF OF RESPONDENTS CHARLOTTE V. DELHAES, M.D. and THE LAKE COUNTY MENTAL HEALTH CENTER

STATEMENT OF THE CASE

Petitioner Patricia Bohatch was admitted for psychiatric treatment as an in-patient into the care of Respondents The Cleveland Clinic Foundation and A. Dixon Weatherhead, M.D. on May 27, 1983. Upon admission, Petitioner was psychotic, delusional, hallucinatory and suicidal. Dr. Weatherhead commenced short-term administration of a very low dose of the drug Haldol. Haldol is a neuroleptic drug prescribed to relieve the symptoms of

certain psychoses, including the paranoia and delusional thinking suffered by Petitioner at that time. It was the drug of choice and no drug alternative existed that did not have substantially similar risks.

Dr. Weatherhead considered the Petitioner, at the time of the administration of the drug, severely psychotic and without the capacity to understand any questions regarding the effects of the medication, and therefore he did not discuss the possible side effects of Haldol with Petitioner prior to commencing the administration of the drug. Dr. Weatherhead was also of the professional opinion that Mr. Bohatch might have been part of Mrs. Bohatch's psychiatric problem. Therefore, he did not believe it would be in Mrs. Bohatch's best interest to discuss the therapy or anything of a confidential nature with Mr. Bohatch.

During Petitioner's admission, the Haldol treatment was suspended for a short time. During that short time, Petitioner relapsed into severe paranoia. Administration of the drug was immediately resumed with beneficial results. When Petitioner was discharged, she was informed by Dr. Weatherhead that if she failed to continue taking Haldol, she would likely suffer a relapse of the symptoms she previously suffered from, including psychosis, morbid depression, intense guilt and paranoid delusions. Dr. Weatherhead further advised her to seek medical attention if any side effects or inexplicable symptoms developed.

Petitioner was discharged from the care of the Cleveland Clinic and Dr. Weatherhead on June 28, 1983 into the care of a more local facility on an out-patient basis, under the care of Respondents the Lake County Mental Health Center and Dr. Delhaes. Dr. Delhaes continued the Haldol

treatment, with the exception of reducing Petitioner's daily dosage of Haldol on July 27, 1983, from 3 times per day to 2 times per day, and again on December 22, 1983 from 2 times per day to once per day. Dr. Delhaes did not discuss tardive dyskinesia (a movement disorder) as a possible side effect of Haldol, because, in her professional opinion, development of the disorder was a rare occurrence in connection with Haldol use, and there were no reasonable alternative treatments available. In January of 1984, Petitioner had developed tardive dyskinesia.

Petitioner then brought suit against Respondents in the Court of Common Pleas of Lake County, Ohio. At trial, Respondents produced expert testimony that Haldol was properly prescribed and administered, and was critical for controlling Petitioner's symptoms. The jury found for Respondents.

Petitioners duly filed an Appeal of that judgment in the Eleventh District Ohio Court of Appeals. Petitioners did not raise any constitutional issues or other federal questions. Petitioners argued only that an improper jury instruction had been given on informed consent; that the trial court had erred in denying Motions for a Directed Verdict and for Judgment Notwithstanding the Verdict; and that the jury verdict was against the manifest weight to the evidence. The Court of Appeals affirmed the trial court, and found that the Petitioners had waived any objection to the jury instructions which, in any event, properly stated the law of Ohio on the issue of informed consent. On the issues of denial of directed verdict and denial of judgment notwithstanding the verdict, the Court of Appeals found that the trial court properly submitted

the case to the jury and that there was sufficient evidence to support the jury's verdict.

Petitioners then attempted to obtain review by the Ohio Supreme Court, raising the same state law issues and making no federal claims. The Ohio Supreme Court declined to accept jurisdiction. In a last-ditch effort, petitioners then filed their Petition for Writ of Certiorari in this Court. The Petition raised, for the first time, the argument that Ohio's Informed Consent law violates the Ninth and Fourteenth Amendments of the United States Constitution.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition should be denied because Petitioners failed to raise the federal questions and constitutional issues at trial or on appeal in Ohio courts, and because Ohio's law on informed consent does not violate Petitioner's constitutional rights.

A.

PETITIONERS FAIL TO RAISE ANY FEDERAL QUESTIONS OR CONSTITUTIONAL CLAIMS IN ANY OF THE OHIO COURTS ADJUDICATING OR REVIEWING THE CASE AND THEREFORE THIS COURT HAS NO JURISDICTION TO REVIEW ANY SUCH FEDERAL QUESTIONS OR CONSTITUTIONAL CLAIMS.

It is a well-established rule that litigants who seek United States Supreme Court review of state court cases must present federal questions and/or constitutional is-

sues first in the state court system, not only as a matter of comity, but also in order to afford the parties an opportunity to develop a record necessary to adjudicate the federal issues. *Webb vs. Webb,* 451 U.S. 493, 68 L.Ed2d 396, 101 S.Ct. 1889 (1981). Moreover, the Supreme Court has no jurisdiction to review a state court decision unless it appears affirmatively from the record not only that a federal question was presented for decision to the state court, but that the federal question was actually decided. *Southwestern Bell Telephone Company vs. State of Oklahoma,* 303 U.S. 206, 82 L.Ed 751, 58 S.Ct. 528 (1938).

This fundamental jurisdictional rule is emphasized and reinforced in Part V of the Rules of the Supreme Court of the United States, governing jurisdiction on Writ of Certiorari. For example, Rule 21(h) requires a Petitioner seeking review of a state court decision to specify, in the Statement of the Case, the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears as will show that the federal question was timely and properly raised so as to give the Supreme Court jurisdiction to review the judgment on Writ of Certiorari.

Petitioners have not, and cannot, comply with Rule 21(h).

Petitioners did not raise a federal question or constitutional challenge, or even refer to the constitutional pro-

visions on which they base their petition, at any stage of the proceedings in either the trial court or the appellate court. Neither of those courts considered any federal question or constitutional challenge and no record has been developed for consideration of those questions or issues in this Court.

Petitioners attempt to circumvent their failure to raise the federal questions below by arguing that their Brief in Support of their proposed jury instructions requesting a subjective instruction on the issue of consent adequately sets forth the federal questions and constitutional challenges they raise for the first time in their Petition to this Court. However, even a casual reading of that Brief, reproduced in Petitioner's Appendix to their Petition at page A18, clearly shows that Petitioners were not raising federal questions or arguing that their constitutional rights had been violated. Rather, Petitioners' argument was that application of an objective standard on the issue of consent would be an incorrect application of *Ohio* law. Petitioners reached that conclusion in their Brief by way of the novel argument that the Ohio Supreme Court, in *Nickell vs. Gonzalez,* 17 Ohio St.3d 136 (1985), "Inadvertently inserted the words 'reasonable person . . . would have decided against the therapy . . .' raising the Ohio standard as previously adopted by Ohio courts from that of patient-subjective to that of unreasonably objective." The Petitioners were clearly making a state law argument in that Brief. Moreover, the Ohio Court of Appeals, as can be seen from its Opinion reproduced in Petitioners' Appendix, attached to their Petition at page A3, decided only questions of Ohio law. That Opinion also restates Petition-

ers' Assignments of Error at the Appellate level, which clearly indicate that no federal questions or constitutional challenges were raised at the Appellate level.

Petitioners did not preserve the federal questions and constitutional challenges which they now seek this Court to review in the state trial or appellate courts and the Petition should be denied.

B.

PETITIONERS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY OHIO COURTS' APPLICATION OF AN OBJECTIVE STANDARD IN DETERMINING CAUSATION IN AN INFORMED CONSENT CASE.

Even if Petitioners did preserve the federal questions and constitutional challenges which they now wish this Court to review, they have failed to raise a legitimate constitutional issue before this Court. The elements which must be established in order to state a cause of action for lack of informed consent under Ohio law are set forth in *Nickell vs. Gonzalez, supra.* Those elements are:

(a) The physician failed to disclose to the patient and discuss the material risks inherently and potentially involved with respect to the proposed therapy, if any;

(b) The unrevealed risks and dangers which should have been disclosed by the physician actually materialized and were the proximate cause of injury to the patient; and

(c) A reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy.

Determination of causation through the use of this objective standard does not limit personal rights, but rather provides a reasonable and practical means of determining causation after a claim is made. Many jurisdictions throughout the United States have rejected the subjective standard in informed consent cases and have expressly adopted the objective standard. *See,* e.g., *Canterbury vs. Spence,* 464 F.2d 772 (D.C.Cir. 1972). The absolute subjective standard Petitioners advocate is completely unrealistic. A determination under such a standard would ultimately hinge on the credibility of the hindsight of a person seeking recovery after he has experienced unsuccessful or undesirable treatment results. *See, Sard vs. Hardy,* 379 A.2d 1014 (MD Abp. 1977); *Dessi vs. United States,* 49 F. Supp. 722 (D.Va. 1980); and *Cobbs vs. Grant,* 502 P.2d 1 (S.Ct. Calif. 1972). As those courts have held, justice cannot be served by placing the physician at the mercy of every patient's perfect hindsight vision. To do so would be to require a physician to disclose all potential risks, however immaterial they may be. Even then, a physician could still not be adequately assured that he has taken all possible steps to procure informed consent, since he would still be at the mercy of the unpredictable whims and fears of the idiosyncratic patient. The only realistic solution to this problem is a reasonableness standard.

The objective standard of informed consent utilized by the majority of states, including Ohio, does not deprive an individual of due process or privacy, or establish a favored class of defendants in violation of the equal protection clause. The Petition should be denied.

———o———

CONCLUSION

Petitioners failed to raise the federal questions and constitutional issues which they now ask this Court to review at either the trial court level or the Appellate court level in Ohio. This Court, therefore, has no jurisdiction to review those decisions and Petitioners have waived any such claims. Moreover, Petitioners' claims are completely without substantive merit. This Court's review of those decisions is not warranted.

Respectfully submitted,

GARY H. GOLDWASSER,
Counsel of Record
THOMAS R. KELLY
REMINGER & REMINGER CO., L.P.A.
113 St. Clair Avenue, N.E.
Cleveland, Ohio 44114-1273
(216) 687-1311

Counsel for Respondents
Charlotte V. Delhaes, M.D. and
The Lake County Mental
Health Center

Supreme Court, U.S.
FILED
APR 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PATRICIA BOHATCH, *et al.*,
Petitioners,

v.

CHARLOTTE V. DELHAES, M.D., *et al.*,
Respondents.

On Petition For Writ of Certiorari To the Court of Appeals, Eleventh Appellate District, Lake County, Ohio

REPLY BRIEF

EUGENE A. LUCCI
Counsel of Record
WALTER J. MCNAMARA III
MCNAMARA, LUCCI & LOXTERMAN
7200 Center Street, Suite 300
Mentor, Ohio 44060
(216) 974-1119 953-9455

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

A.

THE MANNER IN WHICH PETITIONERS RAISED THEIR CONSTITUTIONAL CLAIMS DOES NOT BAR THIS COURT FROM REVIEWING THOSE ISSUES PURSUANT TO ITS CERTIORARI JURISDICTION.

Petitioners argued in the trial court, and in every subsequent appeal, that Ohio's "reasonable person" consent standard destroys the patient's "right of sovereignty", so as to deprive the patient his right to redress in the courts.

Although early opinions of this Court seemed to require that a specific constitutional issue was "pressed or passed upon below" as jurisdictional, more recent cases clearly view the rule as merely a "prudential restriction" that does not pose an insuperable bar to (the Supreme Court's) review". *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983); *Banker's Life and Casualty Co. v. Crenshaw*, ___ U.S. ___, 100 L.Ed.2d 62, 108 S.Ct. 1645 (1988).

Therefore, the manner by which this issue was raised in the trial court and in the Ohio appellate courts does not bar this Court from reviewing the matter pursuant to its certiorari jurisdiction.

B.

OHIO'S APPLICATION OF AN OBJECTIVE CONSENT STANDARD MANIFESTLY VIOLATES THE PETITIONERS' CONSTITUTIONAL RIGHTS, AND BECAUSE THERE IS A MAJOR DIVERGENCE OF DECISIONS THROUGHOUT THE UNITED STATES AS TO WHETHER THE INFORMED CONSENT STANDARD SHOULD BE OBJECTIVE OR SUBJECTIVE, THIS COURT SHOULD REVIEW THIS ISSUE AS A MATTER OF FUNDAMENTAL CONSTITUTIONAL IMPORTANCE.

Both the Petition for Writ of Certiorari and the opposing brief in this matter indicate that many states have

chosen the objective standard of informed consent, while others have chosen the subjective standard. Petitioners have cited approximately a dozen states that favor Petitioners' approach, and Respondents have cited approximately the same number which support the objective standard of consent. Still other states have not yet passed upon this issue.

The issue of informed consent touches the lives of every person in the United States, and, depending upon where she is treated, a patient's constitutional rights will either be preserved or violated.

This is exactly that sort of divergence of constitutional opinion on which this Court's judgment is needed.

The informed consent law of Ohio and a majority of states does deprive an individual of privacy, due process of law, and equal protection, and the Petition for Writ of Certiorari should be granted.

CONCLUSION

For these reasons and for the reasons advanced in the Petition for Writ of Certiorari, the writ should be granted.

Respectfully Submitted,

EUGENE A.LUCCI
Counsel of Record
WALTER J. MCNAMARA III
MCNAMARA, LUCCI & LOXTERMAN
7200 Center Street, Suite 300
Mentor, Ohio 44060-4900
(216) 974-1119 953-9455
Counsel for Petitioners
Patricia Bohatch & William Bohatch